

**FEDERAL PUBLIC DEFENDER'S OFFICE**  
**WESTERN DISTRICT OF NEW YORK**

MARIANNE MARIANO  
**FEDERAL PUBLIC DEFENDER**  
marianne\_mariano@fd.org

300 PEARL STREET, SUITE 200  
BUFFALO, NEW YORK 14202

BRIAN P. COMERFORD  
**ASSISTANT FEDERAL PUBLIC DEFENDER**  
brian\_comerford@fd.org

716-551-3341  
FAX: 716-551-3346

ROCHESTER OFFICE  
28 EAST MAIN STREET  
FIRST FEDERAL PLAZA, SUITE 400  
ROCHESTER, NEW YORK 14614  
585-263-6201  
585-263-5871-FAX

*REPLY TO: BUFFALO*

October 18, 2016

Honorable Jeremiah J. McCarthy  
United States Magistrate Judge  
United States District Court  
Robert H. Jackson Courthouse  
2 Niagara Square  
Buffalo, New York 14202

RE: *United States v. Ari Baum*  
14-CR-164-WMS-JJM

Dear Honorable Judge McCarthy:

This supplemental letter brief is filed in response to this Court's September 27, 2016 text order (Dkt. No. 75) requesting "letter briefs addressing if further testimony is necessary on the issue of whether the agents acted reasonably in relying on the November 21, 2013 search warrant for defendant's Facebook account . . . conducting their search." For the following reason, from the defendant's point of view further testimony is not necessary.

In pertinent part,<sup>1</sup> the government has argued that its agents reasonably relied on the November 21, 2013 search warrant, and abided by its terms (Dkt. No. 39 at 8-9; Dkt. No. 48 at 2-3; Dkt. No. 65 at 2-4). Thus, it has claimed that, ". . . anything that agents came across during that process, which was evidence of criminal activity that agents had probable cause to believe the defendant engaged in, was subject to the 'plain view' exception to the warrant requirement" (Dkt. No. 65 at 3).

It is the government's burden to demonstrate that the agents' reliance on the November 21, 2013 warrant was objectively reasonable: "When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." *United States v. Leon*, 468 U.S. 897, 924 (1984); *see also United States v. Santa*, 180 F.3d 20, 25 (2d Cir. 1999) (same); *United States v. Turner*, 713 F.Supp. 714, 721 n.6 (D. VT 1989) (same). Likewise, because "plain view" is an exception to the Fourth Amendment's warrant requirement, the government is required to prove that it applies: "The

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<sup>1</sup> Mr. Baum recognizes that the government has advanced other arguments, but discusses only those relevant to this Court's September 27, 2016 order.

burden is on those seeking the exemption to show the need for it.” *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971); *see also United States v. Kiyuyung*, 171 F.3d 78, 83 (2d Cir. 1999) (same); *United States v. James*, 415 F.Supp.2d 132, 145 (EDNY 2006) (same).

At the September 27, 2016 evidentiary hearing, the government offered the testimony of Special Agent Randall E. Garver, the initial lead agent assigned to Mr. Baum’s case who secured the November 21, 2013 warrant. Agent Garver testified about, *inter alia*, the investigation of Mr. Baum, his discussions of the investigation and the affidavit in support of the search warrant with an Assistant United States Attorney, his explanation of the warrant and his directions on its execution to his fellow agents, and the discovery of evidence against Mr. Baum during the execution of the warrant.

At the conclusion of the hearing, Mr. Baum understood the government to be arguing that Agent Garver’s testimony sufficed to meet its burden to demonstrate entitlement to the “good faith” and “plain view” exceptions. Without conceding the correctness of the government’s position, Mr. Baum recognizes that the government is entitled to make those arguments. The defense does not believe any further testimony is necessary for the parties to address these issues in post-hearing briefs.

Respectfully submitted,

**/s/ Brian P. Comerford**

Brian P. Comerford  
Assistant Federal Public Defender  
Federal Public Defender’s Office  
300 Pearl Street, Suite 200  
Buffalo, New York 14202  
(716) 551-3341; 551-3346 (fax)  
brian\_comerford@fd.org  
*Attorney for Defendant Ari Baum*

BPC:js